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# THE ANATOMY OF VIOLENT CRIME: HOW JUDICIAL ANALYSIS FOR "CRIMES OF VIOLENCE" IMPACTS JUVENILES WHEN APPLIED TO THE FEDERAL JUVENILE DELINQUENCY AND TRANSFER STATUTE

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## INTRODUCTION

Though statistics clearly indicate "violent crime" in the United States is declining[1], the question of whether a crime is considered "violent" for the purposes of the law is as prevalent as ever.[2] In 1984, Congress passed the Comprehensive Crime Control Act (CCCA)[3] in an effort to improve federal criminal laws.[4] The Act

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[1] *See* https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/violent-crime

[2] *See Id.*

[3] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1837 (1984) (codified as amended in scattered sections amongst U.S.C. titles 18, 21, 28, 29 and 34).

imposed mandatory minimum sentences for offenders who committed criminal offenses.[5] Additionally, the CCCA increased penalties for offenses considered to be violent crimes.[6]

Whether a defendant's prior conviction qualifies as a crime of violence is an important question of law that courts must decide. Should a court find a crime of violence occurred, the question becomes whether the defendant's prior convictions should factor into sentencing.[7] The latter question is often left for the appellate courts to resolve after a defendant appeals his or her sentencing, post-trial. In such appeals, the defendant typically alleges that the district court's decision to enhance sentencing based on the defendant's prior history of violent crime was improper. However, there are some instances when courts must decide such an issue before any proceedings begin, including charges brought under the Federal Juvenile Delinquency Act discussed in Section III of this comment.

Under the Armed Career Criminal Act (ACCA),[8] for example, the court can increase the mandatory minimum sentence from ten to fifteen years for federal defendants who have three prior convictions for a crime that "has as an element thereof the use, attempted use, or threatened use of physical force against the person of another."[9] Problems for the courts appear in the vague nature of this definition. Two common issues arise for courts when interpreting the statutory language: 1) determining what constitutes "physical force," as well as to what degree of physical force must be used and 2) determining whether a "crime of violence" includes crimes that are intentional or accidental.[10]

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[4] HILLEL SMITH, CONG. RESEARCH SERV., R45220. THE FEDERAL "CRIME OF VIOLENCE" DEFINITION: OVERVIEW AND JUDICIAL DEVELOPMENTS 1 (2018) (HEREINAFTER "SMITH").

[5] *Id.*

[6] *Id.*

[7] The law contemplates both state and federal convictions.

[8] Pub. L. No 98-473, Tit. II, 98 Stat. 1837 (1984).

[9] United States v. D.D.B., 903 F.3d 684, 689 (7th Cir. 2018) (quoting 18 U.S.C. § 5032 (2012)).

[10] *See* Smith, *supra* note 4.

As for the first concern, most circuits, including the Seventh Circuit, agree that "physical force" must be violent or destructive in nature.[11] Some courts, such as the Eleventh Circuit, have strayed from this idea and concluded that there needs to be violent force to qualify a crime as one of violence.[12]

Although courts can look to precedent as guides to their analysis, individual states draft their criminal statutes differently, making it difficult to apply one standard to all situations. Several landmark Supreme Court decisions have clarified state statutes that are unclear about whether certain crimes fall under a "crime of violence" category. One such case is *Johnson v. United States* discussed later in this comment. [13]

**Part I** of this Comment explores various legislation requiring the court's analysis for "crimes of violence," including the Comprehensive Crime Control Act and the Armed Career Criminal Act, as well as the Federal Sentencing Guidelines related to "Crimes of Violence," including case law invalidating some of the provisions of these statutes; **Part II** of this comment explores how courts approach the interpretation of Crimes of Violence and the recent circuit and federal decisions that aid them in the process; **Part III** of this comment discusses the Federal Juvenile Delinquency Act and implications for juveniles being transferred to adult proceedings based on this statute in particular and the consequences in general; **Part IV** of this Comment addresses how the Seventh Circuit's decision in *United States v. D.D.B.* is unique, changing the court's analysis by concluding that attempted robbery is not a crime of violence in

[11] *See* Whyte v. Lynch, 807 F.3d 463, 468-69 (1st Cir. 2015); United States v. Rede-Mendez, 680 F.3d 552, 558 (6th Cir. 2012); United States v. Haileselassie, 668 F.3d 1033, 1035 (8th Cir. 2012); Singh v. Ashcroft, 386 F.3d 1228, 123334 (9th Cir. 2004); United States v. Benegas-Ornelas, 348 F.3d 1273, 1275 (10th Cir. 2003); Chrzanoski Ashcroft, 327 F.3d 188, 195-97 (2d Cir. 2003); Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir. 2003); United States v. Landeros-Gonzales, 262 F.3d 424, 426-27 (5th Cir. 2001).

[12] *See* Smith, *supra* note 4.

[13] Johnson v. United States, 559 U.S. 133, 140 (2010).

Indiana, paving a path for courts to use their discretion to keep juveniles out of adult proceedings.

## PART I – LEGISLATION HISTORY DEFINING "CRIMES OF VIOLENCE"

A court's decision to label crimes as "crimes of violence" is one of discretion rather than statutory language. In fact, the specific term "crime of violence" does not explicitly appear in statutes like the ACCA or the Federal Juvenile Delinquency Act.[14] The Seventh Circuit explained in *United States v. Edwards* that its use of the term "crime of violence" is the language that courts have adopted in reference to the statutory language guiding enhancement provisions based on prior crimes.[15] In *Edwards*, the court had to determine whether the petitioner's prior conviction in Wisconsin for burglary qualified as a crime of violence.[16] In doing so, the court provided a framework to interpret whether a crime is a crime of violence.[17] The court stated that "if state law defines the offense more broadly than the [Federal Sentencing] Guidelines, the prior conviction doesn't qualify as a crime of violence, even if the defendant's conduct satisfies all of the elements of the Guidelines offense."[18] This reasoning was echoed by Justice Rovner in *D.D.B.*[19]

The foregoing indicates the importance of this issue. Regardless of whether the alleged latest crime carries a lesser sentence, a court's determination that a defendant's previous conviction was for a crime of violence affects sentencing guidelines. Even if the defendant's most

[14] The specific language in both of those statutes is included in their respective places in this comment.

[15] 836 F.3d 831, 834-35 (7th Cir. 2016) (referencing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2)(U.S. SENTENCING COMM'N 2015)).

[16] United States v. Edwards, 836 F. 3d 831, 836 (7th Cir. 2016).

[17] *See generally Id.*

[18] *Id.* at 833

[19] United States v. D.D.B., 903 F.3d 684, 689 (7th Cir. 2018).

recent crime carries a lesser sentence, if he or she were to be found guilty, that determination could increase the defendant's ultimate sentence. The courts are not the only governmental body struggling with the definitions of violent crime. In fact, with recent decisions striking down statutory language, the issue of categorizing violent crime is equally as challenging at the legislative level.

### *Comprehensive Crime Control Act of 1984*

The Comprehensive Crime Control Act of 1984 (CCCA)[20] is one of the most extensive reform legislations in modern American history.[21] Signed into law by President Ronald Reagan on October 12, 1984, the CCCA's purpose was to clean up the crime problem in society at the time.[22] The more significant sections of the Act, amongst others, covered regulation on issues such as bail reform, sentencing, and the insanity defense.[23] In a significant portion of the CCCA, the legislature passed the Sentencing Reform Act[24] intended to create a uniform system of sentencing and to correct past leniency for serious offenders.[25] The Sentencing Reform Act established a U.S. Sentencing Commission responsible for recommending and drafting sentencing guidelines for federal judges.[26] In an effort to increase accountability in the judiciary, judges are required to explain why they strayed from

[20] Comprehensive Crime Control Act of 1984, Pub. L. No 98-473, tit. II, 98 Stat. 1837 (1984).

[21] *See* http://criminal-justice.iresearchnet.com/crime/school-violence/the-comprehensive-crime-control-act/

[22] *Id.*

[23] *Id.*

[24] Pub. L. No. 98-473, tit. II, 98 Stat. 1987 (1984) (codified as amended in scattered section among U.S.C. titles 18 and 28).

[25] *See, generally*, U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991), available at https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf

[26] U.S. SENTENCING COMM'N ANN. REP. 137974 (1990).

the guidelines if they choose to do so.[27] After surviving a constitutional challenge, the guidelines took effect in late 1989.[28] As a result, the commission also drafted new guidelines for mandatory minimum sentencing provisions aimed at targeting drug and weapon offenses, as well as recidivist offenders.[29]

Under the CCCA, codified under 18 U.S.C. § 16, a crime of violence is defined as:

> "(a) an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[30]

### *Armed Career Criminal Act*

The Armed Career Criminal Act (ACCA) was also enacted in 1984 as a deterrence effort to curb recidivism.[31] The ACCA requires a mandatory fifteen-year minimum prison sentence for felons who have

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[27] http://criminal-justice.iresearchnet.com/crime/school-violence/the-comprehensive-crime-control-act/

[28] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991), available at https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf>; *see also* Mistretta v. United States, 488 U.S. 361 (1989).

[29] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991), available at <https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf>.

[30] 18 U.S.C. § 16 (a),(b).

[31] Comment, *Armed Career Criminal Act – Residual Clause* – Johnson v. United States, 129 HARV. L. REV. 301, 308 (2015) [hereinafter "ACA Comment"].

three prior convictions for violent offenses or serious drug crimes upon a conviction for an offense involving a firearm.[32] The ACCA provides, in relevant part:

> "[T]he term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that:
>
> (i) has an element of the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another…"[33]

Specifically, the ACCA names burglary, arson, extortion, and crimes involving explosives as violent felonies.[34]

In 2010, the Supreme Court in *Johnson v. United States*[35] considered whether Florida's felony battery offense constituted a violent felony under the ACCA.[36] Under this statute, a battery is committed by "[a]ctually and intentionally touch[ing]" another person.[37] The Court had to determine whether that "has as an element the use … of physical force against the person of another."[38] In order to enhance Johnson's sentence in the new offense, three of Johnson's five prior felony convictions would have had to be found to be

[32] *Id.* at 309.
[33] 18 U.S.C. § 924(e)(2)(B).
[34] *See* ACA Comment, *supra* note 31.
[35] *See* Johnson, *supra* note 13.
[36] *Id.* at 135.
[37] *Id.*
[38] *Id.*

"violent felonies."[39] At his sentencing, Johnson disputed his prior battery conviction as a violent crime on the premise that battery in Florida is typically a first-degree misdemeanor and the only reason it was enhanced to a third-degree felony was because of his prior felony record.[40] Although Johnson urged the Court to rely on state precedent, the court made it clear that the interpretation of state statutes is a question of federal law, and not state law.[41] Therefore, the Court looked to federal precedent to determine if the state statute qualifies as a violent crime.[42] The Court reversed the Eleventh Circuit's opinion and declined to categorize battery as a violent crime under the Florida statute and sentencing paradigm because the action required in Florida's statute did not amount to "physical force" in the context of "violent felony".[43]

### *Federal Sentencing Guidelines and the Federal "Crime of Violence" Definition*

The Federal Sentencing Guidelines[44] provide an extensive roadmap of how judges should sentence defendants upon conviction. Specific to crimes of violence, the guidelines require enhancements for certain crimes that qualify under the definition for violent crimes. Typically, the issue of whether a crime is violent is critical in the sentencing stage of the case proceedings. The Guidelines define a crime of violence as follows:

[39] *Id.* at 136
[40] *Id.*
[41] *Id.* at 138.
[42] *Id.*
[43] *Id.* at 143-145
[44] Hereinafter the "Guidelines."

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another or,
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).[45]

Courts examine three factors when determining whether a crime is a crime of violence: (1) the underlying conduct of a criminal offense, the statutory elements of the offense, or a combination of both to determine whether the defendant's prior conviction is for a crime of violence; (2) degree of force necessary to satisfy the "physical force" element in the statutory crime of violence definition and (3) examining whether the crime requires a specific mental state.[46] The court in *D.D.B.*, as analyzed further in Section IV of this comment, focused strictly on the third prong of analysis as it explored whether the crime of attempted robbery requires a specific mental state.[47]

The definition of a "crime of violence" lacked clarity, and in 2018, the Supreme Court addressed this issue.[48] In *Sessions v. Dimaya*, the Court settled the issue when it held that the residual clause of the federal "crime of violence" definition was unconstitutionally vague.[49] The residual clause of the statute is the portion under section 16(b)

[45] U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(A)(2) (U.S. SENTENCING COMM'N 2015).

[46] Smith, *supra* note 4, at 4.

[47] United States v. D.D.B., 903 F.3d 684, 689 (7th Cir. 2018).

[48] *See* Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

[49] *Id.* at 1210.

stating "any other offense that is a felony and that, by its nature, involves a substantial risk of physical injury."[50] The Court relied on its analysis in *Johnson* to guide its ultimate ruling in *Sessions*, finding that Justice Scalia's reasoning in *Johnson* is precisely applicable in this case.[51]

By diving into *Johnson*'s ruling, Justice Kagan explained how two features of the residual clause rendered it unconstitutionally vague.[52] First, the residual clause created "grave uncertainty about how to estimate the risk posed by a crime" because it demanded that the judge decide what "kind of conduct the 'ordinary case' of a crime involves."[53] In fact, the ACCA lacked guidance for judges and left the "ordinary case" up to subjective interpretation.[54] Second, the residual clause did not offer a clear "threshold level of risk [which] made any given crime a 'violent felony.'"[55] In other words, the residual clause demanded that the court apply the "serious potential risk" standard to "an idealized ordinary case of the crime."[56] Essentially, the language of the residual clause was too unpredictable to survive constitutional scrutiny because of its "indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony."[57] By using a categorical approach analysis, the Supreme Court held that under the 18 U.S.C. § 16, statute that defines "aggravated felonies" for immigration purposes is unconstitutionally vague because it demands interpretation of an ordinary-case requirement and a risk threshold, resulting in arbitrary conclusions and does not give fair notice.[58]

[50] *Id*. at 1211.
[51] *Id.* at 1213.
[52] *Id.*
[53] *Id*. at 1214 (internal quotations in original).
[54] *Id.*
[55] *Id.* (quotations in original).
[56] *Id.*
[57] *Id.* (citing Johnson v. United States, 135 S. Ct. 2552, 2558 (2005)).
[58] *Id.* at 1223

Although a legal definition of a violent crime does not seem significant, the court's decision about whether a crime is one "of violence" has tremendous consequences for the defendant. For example, in the immigration context under the Immigration and Nationality Act, like in *Sessions*, "a non-U.S. national who commits a 'crime of violence' for which the term of imprisonment is at least one year may face significant immigration consequences, including being subject to removal from the country and thereafter rendered generally ineligible for readmission."[59] Additionally, the consequences for juvenile offenders are even more dire as discussed in Section IV.

## PART II - JUDICIAL APPROACHES TO INTERPRETATION

In order to determine whether an offense is a crime of violence, courts most often use the categorical approach.[60] When using the categorical approach, courts focus on the statutory definition of the prior offense.[61] The court must assess whether "the elements of the offense are the type that would justify its inclusion . . . without inquiring into the specific conduct of this particular offender."[62] When interpreting state statutes, federal courts must determine whether the state law defines the offense more broadly than the Guidelines. If so, then the conviction cannot qualify as a crime of violence even if the defendant's conduct satisfies the Guidelines elements.[63] When utilizing this analysis, courts do not look to the facts that arose in the

[59] *See* Smith, *supra* note 4 (quotations in original).

[60] *See* United States v. Edwards, 836 F. 3d 831, 833 (7th Cir. 2016); *see also* Sessions v. Dimaya, 138 S. Ct. 1204, 1216 (2018).

[61] *See Id*.

[62] James v. United States, 550 U.S. 192, 202 (2007); *see also* Mathis v. United States, 136 S.Ct. 2243 (2016).

[63] *See* Edwards, 836 F.3d at 833 (quoting Mathis v. United States, 136 S. Ct. 2243, 2245 (2016)); ("'Elements' are the constituent parts of a crime's legal definition, which must be proved beyond a reasonable doubt to sustain a conviction; they are distinct from 'facts,' which are mere real-world things – extraneous to the crime's legal requirements and thus ignored by the categorical approach.")

conviction, but only to the statutory elements of the offense.[64] The Supreme Court developed the categorical approach as a way to address constitutional concerns that might arise if the court solely focuses on the facts of the conviction.[65] Specifically, the focus was to "avoid[ ] the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries."[66] Notably, there is a split in the Supreme Court about the use of the categorical-approach in residual clause cases.[67]

However, when statutes include multiple modes of commission, the courts use a modified categorical approach.[68] Through this approach, appellate courts are able to reference the convicting court's record, such as charging documents and plea agreements, to determine which particular element of the offense the prior conviction at issue was for.[69] Under this approach, the court still does not take into consideration the facts of the conviction.[70]

There is a third option – the underlying-conduct approach, which the courts do not implement often.[71] This approach allows courts to

[64] Smith, *supra* note 4; *see also* Descamps v. United States, 133 S.Ct. 2276 (2013).

[65] Sessions v. Dimaya, 138 S. Ct. 1204, 1217 (2018).

[66] *Id.*; *see also* Descamps, 133 S.Ct. at 267.

[67] *See* Sessions, *supra* note 49, at 1216; *but see* Thomas dissent at 1242, "[I]f the Court thinks that §16(b) is unconstitutionally vague because of the 'categorical approach,' . . . then the Court should abandon that approach – not insist on reading it into statutes and then strike them down."); *see also* Thomas dissent at 1252, "Instead of asking whether the ordinary case of an alien's offense presents a substantial risk of physical force, courts should ask whether the alien's actual underlying conduct presents a substantial risk of physical force."

[68] United States v. Taylor, 630 F.3d 629 (7th Cir. 2010); *see also* Nijhawan v. Holder, 557 U.S. 29, 41 (2009) (permitting a court to determine which statutory phrase was the basis for the conviction by consulting the trial record).

[69] *See Id.* at 633.

[70] *Id.*; *see also* United States v. Woods, 576 F.3d 400, 405 (7th Cir. 2009) ("[A]dditional materials . . . may be used only to determine which crime within a statute the defendant committed, not how he committed that crime.")

[71] *See* Sessions, *supra* note 49, at 1216 (stating that §16(b) cannot be interpreted by inquiring only into the elements of a crime) (Thomas J. Dissenting).

consider the specific facts in which a defendant committed a crime.[72] Justice Thomas discusses and favors this approach when analyzing cases regarding the residual clause of statutes.[73] This approach is most controversial, however, due to constitutional concerns of reassessing facts that were considered by the fact-finder.[74] An instance where the underlying-conduct approach is appropriate in the current pattern of court interpretation is when a statute includes fact-specific language.[75]

## PART III - JUVENILE IMPACT OF CURRENT "CRIME OF VIOLENCE" ANALYSIS UNDER THE FEDERAL JUVENILE DELINQUENCY ACT (§ 5032)

The government may obtain jurisdiction over juvenile offenders and then petition to transfer juvenile cases to adult court if certain elements of the Federal Juvenile Delinquency Act ("FJDA"), codified at 18 U.S.C. § 5032 ("section 5032"), are met.[76] Under the FJDA, a juvenile is "a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday.[77] On the other hand, "juvenile delinquency" is "the violation of a law of the United States committed by a juvenile which would have been a crime if committed by an adult…"[78]

[72] *Id.*

[73] *Id.* at 1256 (discussing the favorability of the underlying-conduct approach) (Thomas J. dissenting).

[74] *Id.* at 1216.

[75] *See* United States. v. Rogers, 804 F.3d 1233, 1237 (7th Cir. 2015) (stating that an exception under 42 § 16911(5)(C) uses fact-specific language and therefore the court must use a conduct-based inquiry to determine whether the Petitioner's conduct qualified under consensual sexual conduct).

[76] 18 U.S.C. § 5032; *but see* United States v. Juvenile Male No. 1, 47 F.3d 68, 71 (2d Cir. 1995) ("Juvenile adjudication is presumed appropriate unless the government establishes that prosecution as an adult is warranted.").

[77] Taylor Imperiale, *Keeping Juvenile Conduct in Juvenile Court: Why the Federal Juvenile Delinquency Act Does Not and Should Not Contain a Ratification Exception,* 2018 U. CHI. LEGAL F. 287, 289.

[78] *Id.*

Under section 5032, a juvenile is first protected against being processed in federal court by prohibiting the government from attaining jurisdiction over the juvenile entirely unless one of three exceptions apply:

"(1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency; (2) the State does not have available programs and services adequate for the needs of juveniles; or (3) the offense charged is a crime of violence that is a felony…"[79]

Then, once the government attains jurisdiction of the juvenile, the government may petition the court to transfer the juvenile to adult court through either the mandatory provision or the discretionary provision.[80]

Under the mandatory provision, the transfer of a juvenile to adult court is mandatory if three conditions are met: (1) the juvenile committed the offense after his sixteenth birthday; (2) the charged offense is a felony that "has an element thereof the use, attempted use, or threatened use of physical force against the person of another"; and (3) the juvenile has previously been found guilty of a crime that "has as an element thereof the use, attempted use, or threatened use of physical force against the person of another."[81] However, judges have discretion to transfer a juvenile to adult proceedings if the juvenile commits certain enumerated offenses, such as distribution of controlled substances, after his or her fifteenth birthday.[82] A basis for

[79] 18 U.S.C. § 5032.

[80] *See e.g.*, United States v. M.C.E., 232 F.3d 1252, 1255 (9th Cir. 2000).

[81] 18 U.S.C. § 5032; *see also* United States v. D.J.H, 179 F.Supp.3d 866, 874 (2016) (holding that carjacking satisfies the second requirement for mandatory transfer under § 5032 because it has "an element the use, attempted use, or threatened use of physical force, and thus satisfies the second requirement for mandatory transfer").

[82] 18 U.S.C. § 5032; *see also* United States v. Juvenile Male No. 1, 47 F.3d 68, 69 (2d Cir. 1995).

this kind of transfer can be satisfied if the prosecution can justify that it is in the interest of justice.[83] In order to make a determination regarding whether the transfer would be in the interest of justice, the court must consider and weigh factors included in the statute.[84]

Under the discretionary provision, the court can deny the government's motion to transfer the juvenile to adult court after weighing all appropriate statutory factors under section 5032.[85] A transfer under this provision can be denied when, after weighing the factors, the court determines that there is a more rehabilitative approach that will be more helpful to the juvenile involved.[86] For example, in *U.S. v. Juvenile Male No. 1*, the district court reversed a recommendation made by a magistrate judge and denied the governments motion for transfer on the basis that the transfer would not serve the interest of justice.[87] According to the district court, the juvenile had a variety of factors in his life that weighed in favor of continuing juvenile proceedings. This allowed the juvenile to receive proper rehabilitative treatment available through the juvenile adjudication process that was not available if he were prosecuted as an

[83] § 381. Prosecution under youthful offender statutes – under federal law; *see also* United States v. I.D.P., 102 F.3d 507 (11th Cir. 1996); *see also* 18 U.S.C. § 5032.

[84] *See* 18 U.S.C § 5032. The statute considers "age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; [and] the availability of programs designed to treat the juvenile's behavioral problems. In considering the nature of the offense, as required by this paragraph, the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms. Such a factor, if found to exist, shall weigh in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer."

[85] *See* United States v. Juvenile Male No. 1, 47 F.3d 68, 69 (2d Cir. 1995).

[86] *Id.*

[87] *Id.* at 70.

adult.[88] On appeal, the Second Circuit held that the district court did not abuse its discretion is denying the government's motion for the juvenile's transfer.[89] In its conclusion, the Second Circuit enumerated the spirit of the discretionary provision:

> "Society has not assisted [I.R.] in alleviating the scars that have marked his emotional and psychological development to date. A strict law and order concept fails to recognize that the poor choices I.R. has made reflect, in part, the limited positive guidance in his development. Congress has provided juvenile adjudication as an alternative to adult prosecution. That reflects a hope that the disastrous effects of the environment in which I.R. has grown can be reversed. In the interests of justice, one last effort off the downward course of life I.R. has followed is the more appropriate choice."[90]

A juvenile's transfer into adult court has tremendous consequences for the delinquent as "nothing can be more critical to the accused than determining whether there will be a guilt determining process in an adult-type criminal trial … [I]f jurisdiction is waived to the adult court, the accused may be incarcerated for much longer and lose certain rights of his citizenship."[91] Annually, about 250,000 juveniles are prosecuted and sentenced in adult federal court.[92] This gives the courts reason to assess juvenile criminal history even more carefully than for adults. Although there is precedent and courts routinely examine what constitutes crimes of violence, there is no indication that they have created a uniform standard, as demonstrated

[88] *Id.* (district court stated that "I.R. was a 'product of poverty,' '[a]n angry child [who] appears to have been simply allowed to walk away.'" Additionally, the court noted the juvenile's "'untapped learning ability' and his ability to distinguish right from wrong.").

[89] *Id.* at 71-72.

[90] *Id.* at 70.

[91] Imperiale, *supra* note 79.

[92] Charles Curlett, and Lauren McLarney, *Journey into Juvenile Justice*, FEDERAL LAWYER, 64 FEB FEDRLAW 10 (2017).

by the Seventh Circuit's recent decision in *D.D.B.*, concluding that attempted robbery under the Indiana statute is not a violent crime.[93]

## PART IV - ANALYSIS OF UNITED STATES V. D.D.B

The Seventh Circuit addressed a juvenile transfer request and thus discussed whether a juvenile's previous conviction for attempted robbery is a violent crime under Indiana law in *United States v. D.D.B.*[94] In this case, D.D.B., a juvenile defendant, was charged with the robbery of a pharmacy under the United States Criminal Code. The United States petitioned the court to transfer D.D.B to adult court, under 18 U.S.C. § 5032, claiming that the juvenile met the transfer criteria for having a prior conviction for attempted robbery in Indiana.[95] The issue that the court had to decide was whether D.D.B.'s prior conviction for attempted robbery in Indiana qualified as a violent crime under the Indiana statute.[96] Specifically, they had to determine whether attempted robbery as drafted by the Indiana statute "has an element thereof the use, attempted use, or threatened use of physical force against the person of another."[97] Ultimately, in a unanimous decision authored by Justice Rovner, the Seventh Circuit made a two-part holding: (1) that the juvenile defendant's prior conviction for attempted robbery did not qualify as a violent crime that could be used to transfer D.D.B from juvenile to adult court under section 5032, contrary to precedent; and (2) that the district court's blanket rule that any attempted violent felony is itself a violent felony in Indiana is in error and thus any case with such a holding must be vacated and remanded.[98]

It is important to examine the Seventh Circuit's reasoning in precedential cases to understand why the court ruled as it did in

[93] United States v. D.D.B., 903 F.3d 684, 693 (7th Cir. 2018).
[94] *See generally*, *Id*.
[95] *Id.* at 686.
[96] *Id.*
[97] *Id.* at 687.
[98] *Id.* at 693

*D.D.B.* that attempted robbery did not qualify as a violent crime.[99] Using a categorical approach in their analysis, the court engaged in a lengthy discussion about the element of intent.[100] In that discussion, the court revisited its prior decision in *United States v. Duncan*.[101] In *United States v. Duncan*, the Seventh Circuit had to decide whether a robbery conviction under Indiana law qualified as a crime of violence and could therefore satisfy the violent crime enhancement provision under the ACCA.[102] In *Duncan*, the defendant was sentenced to fifteen years instead of ten because he had three prior convictions of robbery in Indiana.[103] The Seventh Circuit in *Duncan* had to determine what the Indiana legislature meant when it included the language "putting any person in fear" in its robbery statute.[104] In order to do so, the Court had to reference Indiana case law.[105]

First, the Court referenced *United States v. Lewis*, in which it had reasoned that "because robbery 'entails taking property from the person of another by force or threat,' it has as an element 'the use, attempted use, or threatened use of physical force.'"[106] Even without using actual force, "a robbery intrinsically involves 'conduct that presents a serious potential risk of physical injury to another,' making it a crime of violence…"[107] Second, the Court referenced *Jones v. State*, an Indiana court decision which determined that robbery by fear can be shown by circumstances that communicate an implicit threat to use physical force, even if there is no explicit threat.[108] Thus, in *Duncan*, the Seventh Circuit affirmed the District Court and held that

[99] *See* United States v. Duncan, 833 F.3d 751 (7th Cir. 2016); *see* Hill v. United States, 877 F.3d 717 (7th Cir. 2017).

[100] United States v. D.D.B., 903 F.3d 684, 690 (7th Cir. 2018).

[101] *Id.* at 689-690

[102] Duncan, 833 F.3d at 752.

[103] *Id.* at 753.

[104] *Id.* at 752.

[105] *Id.*

[106] United States v. Lewis, 405 F.3d 511, 514 (7th Cir. 2005).

[107] *Id.*

[108] Jones v. State, 859 N.E.2d 1219 (Ind. App. 2007)

robbery under Indiana law is a violent felony applicable to the sentencing enhancement under the ACCA.[109]

Further, in D.D.B. the court discussed *Hill v. United States*, where it held that "when a substantive offense would be a violent felony under § 924(e) and similar statutes, an attempt to commit that offense also is a violent felony."[110] Under this precedent, the Court in *D.D.B.* could have ruled that attempted robbery is a crime of violence since the court in *Duncan* determined that robbery under Indiana law is a violent felony.[111] However, Justice Rovner noted in the *D.D.B.* opinion that the holding in *Hill* is "premised on the notion that 'a conviction of attempt requires proof of intent to commit all elements of the completed crime.'"[112] The reasoning in *Hill* relied on two premises – the first, that "an element of attempted force operates the same as an element of completed force," and second, that "conviction of attempt requires proof of intent to commit all elements of the completed crime."[113] This was precisely Judge Hamilton's point in the *Morris v. United States* concurrence, reasoning that "[a]ttempt requires intent to commit the completed crime plus a substantial step toward its completion."[114]

In 2018, the Supreme Court of the United States reached its own conclusion about similar issues.[115] The question in the controversial *Mathis v. United States* was whether the Armed Career Criminal Act creates an exception where a defendant can still have an enhanced sentence if a conviction under a statute lists multiple, alternative means of satisfying one or more of its elements.[116] In its decision, the

[109] United States v. Duncan, 833 F.3d 751, 758 (7th Cir. 2016).

[110] Hill v. United States, 877 F.3d 717, 719 (7th Cir. 2016).

[111] *See* Duncan, 833 F.3d at 758.

[112] D.D.B., 903 F.3d at 690; Hill, 877 F.3d at 719; *see also* Morris v. United States, 827 F.3d 696, 698-99 (7th Cir. 2016) (Hamilton, J., concurring).

[113] D.D.B., 903 F.3d at 690.

[114] Morris v. United States, 827 F.3d at 698 (Hamilton, J., Concurrence).

[115] *See* Mathis v. United States, 136 S.Ct. 2243 (2016).

[116] *Id.* at 2248.

Supreme Court held that robbery is in fact not a violent crime under Iowa statute and "a prior conviction does not qualify as the generic form of a predicate violent felony" (the commonly understood version of a crime) "if the element of the crime of conviction is broader than an element of the generic offense."[117]

Therefore, after implementing a categorical approach, the court in *D.D.B.* ultimately held that the juvenile defendant's prior conviction for attempted robbery did not qualify as a violent crime that could be used to transfer D.D.B from juvenile to adult court under section 5032 because Indiana's attempt statute does not require the government to prove intent.[118] Because the statute does not require the government to prove intent, no fact-finder during D.D.B.'s trial ever made a determination that he had any intent to commit any of the elements of robbery.[119] Further, the Court held that the district court's blanket rule that any attempted violent felony is itself a violent felony in Indiana is in error and thus any case with such a holding must be vacated and remanded.[120]

### *The Court in D.D.B Lays a Foundation for Reform of the Juvenile Delinquency Act Under Section 5032*

Although the Seventh Circuit came to the correct decision in its analysis by not categorizing attempted robbery as a violent crime for purposes of a juvenile transfer order under section 5032, this could have been an opportunity for the court to address the differences between determining "crimes of violence" for purposes of juvenile delinquency and "crimes of violence" for purposes of imposing mandatory minimum sentencing under repeat offender statutes. Although any individual facing a higher sentence under an enhancement provision has a lot at stake in the court's decision of

[117] *Id.* at 2245.
[118] D.D.B., 903 F.3d at 691.
[119] *Id.* at 692.
[120] *Id.* at 693.

what constitutes a violent crime in a past conviction, it is detrimental for juveniles who are still on the cusp of a higher rehabilitative age.[121]

In its analysis, as in all analysis concerning violent crime, the Seventh Circuit relied on adult proceeding cases entirely, specifically those used in mandatory minimum cases. In a way, the Seventh Circuit's analysis can be used as a guide to expand interpretation approaches for other cases of similarly situated juveniles to avoid transfer into adult proceedings. The court here could have instead relied on more precedent cases in which a juvenile's crime in particular is being assessed on whether it should count as a crime of violence. The problem with that is there is not much precedent where the juvenile's prior conviction is at issue.

In *U.S. v. M.C.E.*, the Ninth Circuit was presented with whether residential burglary is a crime of violence under Washington law, which would qualify M.C.E. for mandatory transfer to adult court under section 5032.[122] The court used the categorical approach and did not look to the facts of the case to see whether the conduct "resulted in violence or a substantial risk of violence."[123] The compelling point in this case is M.C.E.'s argument as to why residential burglary should not be considered a violent crime.[124] According to M.C.E., the Court should "set aside the cases [finding residential burglary to be a crime of violence] as irrelevant because they address the question in the context of federal sentence-enhancement statutes unrelated to the juvenile transfer provision at issue here."[125]

In response, the Ninth Circuit stated that the difference in purpose is not relevant and can only serve as a distinction.[126] In its holding, the court qualified residential burglary as a crime of violence "because of their conclusions about the nature of residential burglary itself, not

[121] Imperiale, *supra* note 79, at 301.

[122] United States v. M.C.E., 232 F.3d 1252, 1253 (9th Cir. 2000).
[123] *Id.* at 1255.
[124] *Id.* at 1256.
[125] *Id.*
[126] *Id.*

because of the particularities of federal sentencing statutes."[127] The court stated that "[w]hether residential burglary is a crime that creates a substantial risk of violence turns on the dangers inherent in the commission of residential burglary, not on whether that question is considered in the context of sentencing under the Armed Career Criminals Act or transfer to adult status under §5032."[128] In general, the court should have considered juvenile convictions in the first place (even if through the transfer statute). It is nonsensical to treat juveniles the same as recidivist convicted adult criminals.

First, courts should expand their approaches when handling prior convictions for juveniles in transfer decisions. Although the categorical, or modified categorical approaches, are mechanical and logical methods for determining predicate offenses, they limit the court's ability to consider facts of the case when utilizing them. Courts may reference the trial record and charging documents when applying the modified categorical approach, but in a juvenile transfer situation the court should develop an analysis that does consider the facts in order to give the juvenile a substantially greater chance at not being tried as an adult. For instance, by implementing the underlying-conduct approach, the court would have discretion about whether the facts of the case can keep the juvenile out of adult proceedings. For instance, section 5032 of the FJDA states:

> "In considering the nature of the offense, as required by this paragraph, the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms. Such a factor, if found to exist, shall weigh in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer."[129]

[127] *Id.*
[128] *Id.*
[129] 18 U.S.C. § 5032.

Under the discretionary provision, those are some of the factors the court must consider and weigh when deciding if transfer is appropriate to serve the interests of justice.[130] All of those factors are fact-based and if the court is to consider the facts of the particular situation when determining whether the juvenile should be transferred to adult court, then it should follow the same analysis when considering the past offense and whether it is violent. Above all, the criminal law is meant to rehabilitate offenders and juveniles even more so, as young people are more capable of rehabilitation.[131] However, despite their acknowledgement that juvenile conduct "is not as morally reprehensible as that of an adult," courts continue to apply the same standard of analysis as they do in repeat adult offender situations.[132]

Neurological research has shown that juvenile offenders do not possess the same requisite *mens rea* culpability to reach the threshold of adult convictions and should thus not be presented with the level of sentencing that comes with it.[133] Unfortunately, the clear consequence of being transferred into adult proceedings means receiving adult sentences. The FJDA aims to hold juveniles accountable for adult conduct appropriately, as it should. However, an alternative to transferring juveniles to adult court should at least be an option when the facts of the conduct illustrate the juvenile's ability to rehabilitate.

On the other hand, the Court's refusal in *D.D.B.* to look to the facts of his prior conviction in order to do a thorough analysis of whether he had intent to commit a robbery served to his advantage as he was ultimately not transferred to adult court.[134]

Courts also argue that the transfer statute does not increase punishment for juveniles, per se, but only establishes jurisdiction over

[130] *See* 18 U.S.C. § 5032

[131] Imperiale, *supra* note 79, at 301.

[132] *Id.*

[133] *Id.*, at 303.

[134] D.D.B., 903 F.3d at 692. ("Intent is not an element and so a conviction by itself does not establish that the defendant had intent. He could simply knowingly take a substantial step toward the taking of property through force or fear. One would have to look behind the conviction to the underlying facts to know if he had the intent to commit the crime, and this we cannot do.")

the juvenile.[135] Although that is the case in the transfer juvenile cases, once a juvenile is in fact transferred to adult court, they face the same consequences and sentencing as adult defendants – taking away jurisdiction from juvenile adjudication and rehabilitative resources designed for juveniles.

## CONCLUSION

Under section 5032, courts have significant discretion on whether to transfer juveniles to adult proceedings. Considering the lifelong consequences that such a transfer can have on juveniles, courts should do everything in their power not to transfer them unless dire circumstances warrant such a transfer. It can be further argued that one juvenile conviction of a violent crime in a juvenile's criminal history, such as attempted robbery, should not be grounds to transfer if the facts surrounding the attempted robbery, analyzed through an underlying-conduct approach, indicate that the juvenile has potential for rehabilitation and did not play a leadership role in the attempted robbery. Therefore, although the Seventh Circuit in D.D.B. was correct in it its approach when analyzing whether attempted robbery was considered a violent crime under Indiana Statute in this specific instance, it could have considered expanding their analysis to an underlying-conduct approach.

[135] *See* United States v. Juvenile, 228 F.3d 987 (9th Cir. 2000).